1986

David L. Lach, Bonnie Oswald, Kathleen Call, and Lach Family Partnership v. Deseret Bank : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DAVID L. LACH, BONNIE OSWALD, KATHLEEN CALL, and LACH FAMILY PARTNERSHIP,	)	860170-CA
Plaintiffs/ Appellants,	)	No. 860066
vs.	)	Category No. 14
DESERET BANK (formerly Bank of Pleasant Grove),	)	
Defendant/ Respondent.	)	

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BRIEF OF DEFENDANT/RESPONDENT

Appeal from the Sixth Judicial District Court of
Garfield County, Honorable Don V. Tibbs, District Judge

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STATEMENT OF ISSUES

1. Whether Deseret Bank, as a judgment creditor, has a lien against real property that judgment debtors had agreed to sell to one entity, then conveyed to another entity, such agreement being conditional, and in which seller retained possession and revenues until after judgment creditor had docketed judgment.

2. Did lower court err in denying appellant's Motion for Summary Judgment and granting respondent's Cross-Motion.

STATEMENT OF FACTS

The defendant in this case obtained a judgment in the Fourth Judicial District Court, in and for Utah County, on the 7th day of November, 1980, against Dewsnups. This judgment was docketed in the Sixth Judicial District Court, in and for Garfield County, on the 12th day of December, 1980. It appears now that at the time the judgment was docketed, an Earnest Money Receipt and Offer to Purchase had been executed on November 28, 1980. However, the possession of the property was still in LaMar Dewsnup and Althea Dewsnup, as indicated by Exhibit A attached to the affidavit of David L. Lach in support of plaintiff's motion for summary judgment.

This Exhibit A states, among other things, that "Buyer and seller agree that all revenue earned and all liabilities for goods or services incurred before closing shall belong

to seller and all revenues and liabilities incurred after closing shall belong to buyer." The closing did not occur until the 6th of January, 1981, 25 days after the judgment had been docketed. The Uniform Real Estate Contract dated January 6, 1981, and attached to the Lach affidavit and marked Exhibit C, shows, among other things, that possession of the property by the plaintiff was not to occur until the 6th of January, 1981.

In addition to the judgment debtor's having possession long after the docketing of the judgment by the defendant, the option to purchase, set forth in the Lach affidavit as Exhibit A, shows that such option was a conditional option, in that it states: "Offer subject to buyer, to their satisfaction, reaching agreement with former owners as to solution of problems with drain fields, septic tank and water system."

The Assignment and Quit Claim were recorded January 26, 1981, and transferred the interest conveyed by Lach Family Partnership to Foothill Properties, an entity entirely different than that referred to in either the Earnest Money Receipt and Offer to Purchase and the Uniform Real Estate Contract. Foothill Properties appears at this date to be the true party in interest, as no recorded document shows any interest of Foothill Properties reconveyed to Lach Family Partnership. As an explanation, plaintiffs' counsel's only statement is that Foothill Properties is "a name under which David Lach conducts business" (see plaintiffs' brief, page 2).

The executory agreement, which was conditional, was purportedly to have been bound by a $3,600.00 payment upon an obligation of $1,425,600.00, leaving an unpaid interest and equitty on the part of the Dewsnups in the amount of $204,643.98.

SUMMARY OF ARGUMENT

Point I

The deed from the Dewsnups, dated November 28, 1980 and recorded January 26, 1981, was to Foothill Properties, an entirely different entity than any shown in either the earnest money agreement or the Uniform Real Estate Contract, and therefore would not constitute a sale which would prevent the judgment of respondent creating a lien prior to appellants' interest.

Point II

The lower court did not err in granting respondent's Motion for Summary Judgment in that appellant filed a Motion for Summary Judgment in which they asserted that no factual dispute existed. After an adverse ruling they are attempting to now reverse this position and argue otherwise.

ARGUMENT

An executory agreement was entered into on the 28th day of November, 1980, stating that the Lach Family Partnership would take an assignment of contract upon the property only in the event that problems were solved regarding drain fields,

septic tank, and water system. In fact, these problems were mentioned in the Uniform Real Estate Contract executed on the 6th of January, 1981, in paragraph 1 of the Addendum to such contract, stating that the seller agreed "to remain responsible for the repairs and/or modifications to the sewer, water, and property necessary to bring the property up to State standards..."

Paragraph 2 of the Addendum to Uniform Real Estate Contract states that the "Sellers warrant that there are, and will be no outstanding liens of any kind against the property which is the subject matter of this contract, except as indicated in this contract. Should any exist or be placed against the property in the future which arose by virtue of Sellers actions, inactions, or disputes, Sellers agree to remove them within five days after written notice to Seller of such liens." The agreement then goes on to give the buyer the option to make payment upon said liens and consider such as a loan to the seller. This verbiage was agreed to <u>following</u> the actual recording of the judgment in Garfield County.

Appellant asserts at this time that factual issues exist, when at the time of filing their Motion for Summary Judgment they asserted the case to be without factual dispute. This recent assertion of factual dispute is without any specific allegation as to what facts are in dispute. Therefore, the appel lant should be bound by the assertions made in the Motion for Summary Judgment.

APPLICABLE LAW

The Kartchner case referred to by the plaintiffs [Kartchner v. State Tax Comm., reported in 4 U.2d 382, 294 P.2d 790, 791 (1956)], leaves a great deal to be desired as far as revealing what the facts were in that particular case. The very short decision of Judge Henriod does not reveal whether the vendee had paid the full purchase price, was in possession, or had notice of the outstanding undocketed judgment at the time of receiving his deed. The cases seem to hold that all of these factual matters are important in making a determination as to priorities.

As indicated by the appellants' brief, most of the reported cases deal with the vendee's rights in relation to judgment creditors. Although each priority is the converse of the fact situation at hand, it is precedent for the proposition that, if the interest of the vendee in an executory contract cannot be reached, a fortiori, the interests of the vendor in real property is subject to a judgment lien.

As an underlying general statement of the law, 46 AmJur 2d, 273, p. 487, states, "although a different view has been taken, there is authority to the effect that one having a mere option to purchase real estate has not, before the exercise of the option, any interest in the real estate which is subject to the lien of judgment." See Vigars v. Hewins, 184 Iowa 683, 169 N.W. 119; Sweezy v. Jones, 65 Iowa 272, 21 N.W. 603. (In this case, the earnest money agreement was tantamount to an

option, inasmuch as it was conditioned upon the seller performing certain functions before the buyer was bound to purchase.) See also 46 AmJur 2d, 270, p. 486, in which the statement of the law indicates that possession is a necessary ingredient if the judgment lien is to apply against a vendee. See also Cummings v. Duncan, 22 N.D. 534, 134 N.W. 712; 7 A.L.R. p. 1510, 1B as regards interest of vendor as of the time judgment is recovered:

> "The question remains, however, whether the lien of a judgment against the vendor attaches to the extent of his interest as of the time of entry or docketing or other effective date of judgment, so as to reach the balance of the purchase price then remaining unpaid.
>
> "Many of the cases cited in support of the rule that the lien of the judgment cannot attach in excess of the rights of the judgment debtor [vendor under the contract] as they exist at the effective date of the judgment, apparently assumes that the lien of the judgment does attach, and seems to be the view of the textwriter."

See 2 Freeman Judgments 263, 1 Black Judgments 438.

It is obvious in this case that the vendor had a considerable unpaid interest still remaining in the executory agreement. In fact, such interest exceeded $200,000.00. Judge Henriod in Kartchner, supra, mentions in his opinion that if the legislature had intended to include unrecorded deeds, they would have stated "real property of the judgment debtor, recorded." However, the legislature could just as easily have mentioned other interests which are construed to be retained by the vendor, such as lands, tenements, and hereditaments and all

rights thereto and interests therein, as described in Van Camp v. Peerenboom, 14 Wisc. 66.

CONCLUSION

It is submitted that the lien of Bank of Pleasant Grove, now known as Deseret Bank, attached to the Dewsnups' interest in said real property, and the lower court's decision should be sustained.

DATED this 28 day of August, 1986.

/s/
HEBER GRANT IVINS
Attorney for Defendant/Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four correct copies of the foregoing Brief of Defendant/Respondent, postage prepaid, this 28 day of August, 1986, addressed as follows:

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